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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2011-0872; FRL-9504-7]

**Approval and Promulgation of Air Quality Implementation Plans; Virginia;
General Conformity Requirements for Federal Agencies Applicable to Federal Actions**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Commonwealth of Virginia State Implementation Plan (SIP). The revision consists of a regulation adopted by Virginia to incorporate revisions to Federal general conformity requirements promulgated in July of 2006 and in April of 2010. EPA is approving this Virginia SIP revision to update its state general conformity requirements rule for Federal agencies applicable to Federal actions (Virginia's General Conformity Rule) to align with the Federal General Conformity Requirements Rule. This approval action is being taken in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on [insert date 60 days after publication in the Federal Register] without further notice, unless EPA receives adverse written comment by [insert date 30 days after publication in the Federal Register]. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number **EPA-R03-OAR-**

2011-0872 by one of the following methods:

- A. www.regulations.gov. Follow the on-line instructions for submitting comments.
- B. E-mail: fernandez.cristina@epa.gov
- C. Mail: EPA-R03-OAR-2011-0872, Cristina Fernandez, Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.
- D. Hand Delivery: At the previously listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. **EPA-R03-OAR-2011-0872**. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact

information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index.

Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, (215) 814-2176, or by e-mail at rehn.brian@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document, whenever “we,” “us,” or “our” is used, we mean EPA. The following outline is provided to aid in locating information in this preamble.

I. Summary of General Conformity Requirements and the SIP Revision

A. What is General Conformity and How Does it Affect Air Quality?

II. Virginia's General Conformity SIP Revision

III. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

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A. General Requirements

B. Submission to Congress and the Comptroller General

C. Petitions for Judicial Review

I. Summary of General Conformity Requirements and the SIP Revision

A. What is General Conformity and How Does It Affect Air Quality?

The intent of the general conformity requirement is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of a National Ambient Air Quality Standard (NAAQS) or interfering with the purpose of a SIP. Under the CAA as amended in 1990, Congress recognized that actions taken by Federal agencies could affect state and local agencies' abilities to attain and maintain the NAAQS. Section 176(c) of the CAA, as codified in Title 42 of the United States Code (42 U.S.C. 7506), requires Federal agencies assure that their actions conform to the applicable SIP for attaining and maintaining compliance with the NAAQS. General conformity is defined to apply to NAAQS established pursuant to section 109 of the CAA, including NAAQS for carbon monoxide (CO), nitrogen dioxide (NO₂), ozone, particulate matter, and sulfur dioxide (SO₂). Because certain provisions of section 176(c) of the CAA apply only to highway and mass transit funding and approval actions, EPA published two sets of

regulations to implement section 176(c) of the CAA – one set for transportation conformity and one set for general conformity. The Federal General Conformity Requirements Rule was published in the November 30, 1993 edition of the Federal Register (58 FR 63214) and codified in the Code of Federal Regulations at 40 CFR 93.150.

EPA revised the Federal General Conformity Requirements Rule via a final rule issued in the April 5, 2006 edition of the Federal Register (65 FR 17003). EPA had promulgated a new NAAQS in July 1997 (62 FR 38652) that established a separate NAAQS for fine particulate smaller than 2.5 micrometers in diameter (PM_{2.5}). The prior coarse particulate matter NAAQS promulgated in 1997 pertains to particulate matter under 10 micrometers in diameter (PM₁₀). EPA's 2006 revision to the Federal General Conformity Requirements Rule added requirements for PM_{2.5} for the first time, including annual emission limits of PM_{2.5} above which covered federal actions in NAAQS nonattainment or maintenance areas would be subject to general conformity applicability.

On April 5, 2010, EPA revisited the Federal General Conformity Requirements Rule to clarify the conformity process, authorize innovative and flexible compliance approaches, remove outdated or unnecessary requirements, reduce the paperwork burden, provide transition tools for implementing new standards, address issues raised by Federal agencies affected by the rules, and provide a better explanation of conformity regulations and policies. EPA's April 2010 revised rule simplified state SIP requirements for general conformity, eliminating duplicative general conformity provisions codified at 40 CFR part 93 subpart B and 40 CFR part 51, subpart W. Finally, the April 2010 revision updated Federal General Conformity Requirements Rule to

reflect changes to governing laws passed by Congress since EPA's 1993 rule. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) passed by Congress in 1995 contains a provision eliminating the CAA requirement for states to adopt general conformity SIPs. As a result of SAFETEA-LU, EPA's April 2010 rule eliminated the Federal regulatory requirement for states to adopt and submit general conformity SIPs, instead making submission of a general conformity SIP a state option.

II. Virginia's General Conformity SIP Revision

On July, 1, 2011, the Commonwealth of Virginia submitted a formal revision to its SIP. The SIP revision consists of Virginia's General Conformity Rule, Revision F10 to the Virginia Administrative Code (codified at 9VAC5 Chapter 160, with an effective date of March 2, 2011).

The purpose of Virginia's SIP revision is to update the Commonwealth's General Conformity Rule to include new Federal general conformity requirements promulgated on July 17, 2006 (71 FR 40420) and on April 5, 2010 (75 FR 17254), described above.

Virginia's General Conformity Rule (9 VAC5 Chapter 160), adopted on December 17, 2010 and effective March 2, 2011 makes numerous changes to the prior, SIP-approved version of the Virginia General Conformity rule (effective January 1, 1998). Specifically, these changes include:

- a. Modification of section 5-160-20-Definitions to add the terms "applicability analysis," "confidential business information (CBI)," "conformity determination," "conformity evaluation," "continuing program responsibility," "continuous program to implement,"

“emissions inventory,” “mitigation measure,” “restricted information,” and “take or state federal action;”

b. Modification of section 5-160-20-Definitions of the terms “applicable implementation plan,” “areawide air quality modeling analysis,” “direct emissions,” “emissions budgets,” “EPA,” “Federal Clean Air Act,” “indirect emissions,” “local air quality modeling analysis,”

“maintenance area,” “metropolitan planning organization,” “new source review (NSR) program,” “precursors of a criteria pollutant,” and “reasonably foreseeable emissions,”

c. Modification of section 5-160-20-Definitions to delete the terms “emissions that a Federal agency has a continuing program responsibility for” and “regionally significant action”;

d. Modification of section 5-160-30-Applicability to reflect that areas newly designated nonattainment for a NAAQS are subject to conformity one year after the nonattainment effective date; and adds applicability provisions for PM_{2.5} nonattainment areas (with respect to *de minimus* applicability limits of SO₂, nitrogen oxides (NO_x), volatile organic compounds (VOCs), and ammonia emissions); and makes miscellaneous updates to Chapter-160-30-Applicability to reflect the August 2010 revised Federal General Conformity Rule;

e. Modification of section 5-160-110-General to remove outdated provisions;

f. Retitling and modification of Chapter 160-120 to reflect updated cross-references and changes in terminology;

g. Modification of section 5-160-130-Reporting Requirements to reflect to add a section on restricted information and CBI provisions and to add cross-references to that new section;

h. Modification of section 5-160-140-Public Participation to add a new paragraph E addressing treatment of restricted information and CBI, and to add cross-references to that new section;

- i. Retitling and modification of section 5-160-150 to update provisions for reevaluation of conformity and to update or remove outdated provisions;
- j. Modification of section 5-160-160-Criteria for Determining Conformity of General Federal Actions to update cross references; to allow emissions from the action to be accounted for in a reasonable progress milestone or facility-wide emissions budget; and to allow direct and indirect emissions from a nonattainment or maintenance area to be offset from a nearby area of equal or higher classification, provided emissions from that area contributed to violations in the area of the action; and added language committing the Virginia Department of Environmental Quality (VA DEQ) to update its SIP within 18 months of a conformity demonstration based on a commitment by the Commonwealth to include emissions from the action in the SIP;
- k. Modification of section 5-160-170-Procedures For Conformity Demonstrations to make miscellaneous minor corrections and to update outdated provisions; and to modify the cases for which air quality modeling analysis apply;
- l. Modification of section 5-160-180-Mitigation of Air Quality Impacts to update cross-references;
- m. Addition of section 5-160-181-Conformity Evaluation for Federal Installations With Facility-wide Emission Budgets to facilitate the use of facility-wide emissions budgets in evaluating conformity;
- n. Addition of section 5-160-182-Emissions Beyond the Time Period Covered by the Applicable Implementation Plan to address how Virginia treats Federal agencies that demonstrate conformity for an action that causes emissions beyond the time period covered by the SIP;
- o. addition of section 5-160-183-Timing of Offsets and Mitigation Measures to address timing of

offsets and mitigation with respect to a subject federal action, in that such mitigation and offsets are to occur at the same time as the project emission increases; or in the alternative where offsets or mitigation are non-contemporaneous with the action, that said reductions be greater than the resultant emission increases at least as great as applicable NSR ratios for the area; and that the time period for such alternative offset or mitigation schedules not exceed two times the project period; and that such non-contemporaneous offsets shall not cause or contribute to a new violation of, increase the severity of, or delay timely attainment of any NAAQS;

p. Addition of section 5-160-184-Inter-Precursor Mitigation Measures and Offsets to allow the use of inter-precursor offset and mitigation measures, where they are allowed by VADEQ under the approved SIP, technically justified, and have a demonstrated benefit;

q. Addition of section 5-160-185-Early Emission Reduction Credit Programs at Federal Facilities and Installation Subject to Federal Oversight to allow the creation of emissions credits prior to the project (meeting VA DEQ specified requirements) that may then serve as mitigation or offsets for demonstrating conformity instead of being included as part of the baseline emissions analysis for the project; and

r. Repeal of section 5-160-200, which is no longer relevant.

Virginia's prior General Conformity Rule (9VAC5 Chapter 160, effective January 1, 1998) was approved by EPA as part of the Virginia SIP via a final rule published on January 7, 2003 (68 FR 663). Virginia's July 1, 2011 SIP revision that is the subject of this action supersedes the prior approved Virginia SIP.

III. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia’s legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia’s Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information (1) that are generated or developed before the commencement of a voluntary environmental assessment; (2) that are prepared independently of the assessment process; (3) that demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) that are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code Sec. 10.1-1198, precludes granting a privilege to documents and information “required by law,” including documents and information “required by Federal law to maintain program delegation, authorization or approval,” since Virginia must “enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . .” The opinion concludes that “[r]egarding § 10.1-

1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.”

Virginia’s Immunity Law, Va. Code Sec. 10.1-1199, provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General’s January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. What Action is EPA Taking?

EPA has reviewed Virginia's July 1, 2011 SIP revision and found the Commonwealth's SIP to be in compliance with section 176(c) of the CAA and with the requirements of the Federal General Conformity Requirements Rule, codified at 40 CFR part 93, subpart B. Virginia's SIP serves to reduce the impact of Federal actions (not otherwise subject to transportation conformity, which is addressed under a separate Virginia SIP revision), and will prevent subject Federal actions from causing or contributing to a new violation of a NAAQS, or in interfering with attainment or maintenance of a NAAQS or otherwise interfering with the Virginia SIP.

Virginia's July 1, 2011 SIP revision meets the requirements set forth in section 110 of the CAA with respect to adoption and submission of SIP revisions. The approval of Virginia's general conformity SIP revision will strengthen the Virginia SIP and will assist the Commonwealth in complying with Federal NAAQS.

Therefore, EPA is approving Virginia's revision to its general conformity SIP. EPA is publishing this rule without prior proposal because we view this as a noncontroversial amendment and anticipate no adverse comment. However, in the "Proposed Rules" section of today's Federal Register, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on [insert date 60 days from date of publication in the Federal Register] without further notice unless EPA receives adverse comment by [insert date 30 days from date of publication in the Federal Register]. If EPA receives adverse comment, EPA will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect. EPA will address all

public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

V. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);

- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory

Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's Federal Register, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking.

This action to approve Virginia’s general conformity SIP revision may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

November 29, 2011

Dated:

W. C. Early, Acting
Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for 40 CFR part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV--Virginia

2. In § 52.2420, the table in paragraph (c) is amended under Chapter 160 by:

- a. Revising the chapter title;
- b. Removing the two existing entries for section 5-160-20.
- c. Adding a new entry for section 5-160-20 in numerical order.
- d. Revising the entries for sections 5-160-30 and 5-160-110.
- e. Revising the entry for section 5-160-120.
- f. Revising the entries for sections 5-160-130 and 5-160-140.
- g. Revising the entries for sections 5-160-150 and 5-160-160.
- h. Revising the entries for section 5-160-170 and 5-160-180.
- i. Adding new entries for sections 5-160-181, 5-160-182, 5-160-183, 5-160-184, and 5-160-185 in numerical order.
- j. Removing the entry for section 5-160-200.

The amendments read as follows:

<u>§ 52.2420</u>	<u>Identification of plan.</u>
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(c) * * *

EPA-Approved Virginia Regulations and Statutes

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
9 VAC 5, Chapter 160	General Conformity			
Part I	General Definitions			
* * * *	* * *			
5-160-20	Terms defined	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	Number of terms added - 10 Number of terms revised - 11 Number of Terms deleted - 2
Part II	General Provisions			
5-160-30	Applicability	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
* * * *	* * *			
Part III	Criteria and Procedures for Making Conformity Determinations			
5-160-110	General	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-120	Federal agency conformity responsibility	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-130	Reporting requirements	3/2/11	[Insert Federal Register	

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
			<u>publication date</u> [Insert page number where the document begins]	
5-160-140	Public participation	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-150	Reevaluation of conformity	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-160	Criteria for determining conformity of general conformity actions	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-170	Procedures for conformity determinations	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-180	Mitigation of air quality impacts	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-181	Conformity evaluation for	3/2/11	[Insert Federal	

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
	federal installations with facility-wide emission budgets		<u>Register publication date</u> [Insert page number where the document begins]	
5-160-182	Emissions beyond the time period covered by the applicable implementation plan	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-183	Timing of offsets and mitigation measures	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-184	Inter-precursor mitigation measures and offsets	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
5-160-185	Early emission reduction credit programs at federal facilities and installation subject to federal oversight	3/2/11	[Insert Federal Register publication date] [Insert page number where the document begins]	
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[FR Doc. 2011-31664 Filed 12/09/2011 at 8:45 am; Publication Date: 12/12/2011]